

**CT 06-3**

**Tax Type: Cigarette Use Tax**

**Issue: Possession of Unstamped Cigarettes**

**STATE OF ILLINOIS  
DEPARTMENT OF REVENUE  
OFFICE OF ADMINISTRATIVE HEARINGS  
SPRINGFIELD, ILLINOIS**

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**THE DEPARTMENT OF REVENUE  
OF THE STATE OF ILLINOIS**

v.

**JANE DOE, d/b/a ABC'S TAP,  
Respondent**

**Activity No. 0000-0000-0-00**

**Barbara S. Rowe  
Administrative Law Judge**

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**RECOMMENDATION FOR DISPOSITION**

Appearances: Mr. Paul E. Adami, Mohan, Alewelt, Prillaman and Adami for *Jane Doe* d/b/a *ABC's Tap*; Mr. Kent R. Steinkamp, Special Assistant Attorney General, for the Illinois Department of Revenue

**Synopsis:**

This matter comes on for hearing pursuant to the seizure on May 7, 2003 by the Illinois Department of Revenue (hereinafter referred to as the "Department") of 800 packages of "Native" brand cigarettes from the premises of *ABC's Tap*, a retail liquor business in Illinois. The cigarette packages did not have proper Illinois cigarette tax stamps affixed to them as mandated by the Cigarette Tax Act, 35 **ILCS** 130/1 *et seq.* (hereinafter referred to as the "Act"). The issue in this matter is whether the civil penalty of \$11,400 should be imposed on the seizure of the cigarettes. It is recommended that this matter be resolved in favor of the Department. In support thereof, I make the following findings of fact and conclusions of law in accordance with the requirements of Section 100/10-50 of the Administrative Procedure Act (5 **ILCS** 100/10-50).

## **FINDINGS OF FACT:**

1. On May 7, 2003, Special Agents James J. Lippner and Michael Hoff of the Department's Bureau of Criminal Investigation, found 800 packages of Native brand cigarettes in the premises of the Tap, a retail liquor business located in Illinois and operated under Illinois Business Tax No. 0456-9091. The Tap is solely owned and operated by *Jane Doe* (hereinafter referred to as "*Doe*"). (Dept. Gr. Ex. No. 1)
2. At that time and place, the Special Agents seized and confiscated the 800 packages of Native brand cigarettes. (Dept. Gr. Ex. No. 1)
3. The Native brand cigarettes at issue were found by the Special Agents on top of and behind the bar in the Tap. (Dept. Gr. Ex. No. 1)
4. *Doe* purchased the Native brand cigarettes from a Smoke Shop in New York. She had been purchasing cigarettes from that location for about a month prior to the time of the seizure at issue. She paid for them with a credit card and ordered weekly. If she ordered twenty cartons or more, she received free shipping. Her customers came to her Tap to place cigarette orders with her. (Dept. Gr. Ex. No. 1)
5. At the time of the seizure, *Doe* was on the premises and communicated with the Special Agents. In substance she stated that she does not make a profit on the Native brand cigarettes; that she both purchases and sells them for \$10 a carton; and she was told by her attorney<sup>1</sup> at the time and a Smoke Shop that if she did not make a profit on the sale of the Native brand cigarettes, then it was okay for her to

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<sup>1</sup> Special agent Hoff contacted the attorney. The attorney stated that he could not discuss the matter because of attorney client privilege; that he was a family attorney; and that he would never advise about something that he did not know about. (Dept. Ex. No. 1) That attorney did not represent *Doe* at the hearing.

do so. (Dept. Gr. Ex. No. 1)

6. *Doe* also operates a cigarette vending machine at the Tap. The cigarettes in the vending machine contained proper Illinois tax stamps. Those cigarettes are sold for \$4.75 per package. *Doe* purchases the cigarettes for the vending machine from Royal Smoke Shop in Illinois. Those cartons cost about \$35. (Dept. Gr. Ex. No. 1)
7. *ABC's* sales of cigarettes from the vending machines decreased after *Doe* started purchasing the Native brand cigarettes. (Dept. Gr. Ex. No. 1)
8. The cigarettes were delivered to the Tap because *Doe* works a 12-hour day and is rarely home. (Tr. p. 27)
9. *Doe* admitted that in May 2003, when the Revenue inspectors came into her place of business, there were 800 packages of unstamped cigarettes. (Tr. pp. 30-31)
10. *Doe* does not have a Cigarette Distributor's License. (Dept. Gr. Ex. No. 1)

### **CONCLUSIONS OF LAW:**

In this matter, the Department seeks not only the forfeiture of the 800 non-Illinois stamped packages of native brand cigarettes confiscated from the premises of the Tap, but also seeks to have assessed a civil penalty against *Doe* for the possession of these cigarettes.

The Cigarette Tax Act provides as follows:

§13. Whenever any original package of cigarettes is found in the place of business or in the possession of any person who is not a licensed distributor under this Act without proper stamps affixed thereto, or an authorized substitute thereon, underneath the sealed transparent wrapper of such original package, as required by this Act, the prima facie presumption shall arise that such original package of cigarettes is kept therein or is held by such person in violation of the provisions of this Act.

On the issue of the civil penalties sought herein, the Act states:

§ 18c. Possession of not less than 10 and not more than 100 original packages not tax stamped or improperly tax stamped; penalty. With the exception of licensed distributors, anyone possessing not less than 10 and not more than 100 packages of cigarettes contained in original packages that are not tax stamped as required by this Act, or that are improperly tax stamped, is liable to pay to the Department, for deposit into the Tax Compliance and Administration Fund, a penalty of \$10 for each such package of cigarettes, unless reasonable cause can be established by the person upon whom the penalty is imposed. Reasonable cause shall be determined in each situation in accordance with rules adopted by the Department. 35 **ILCS** 130/18c

Another section of the Act addresses penalties for packages of cigarettes in excess of 100.

It states:

§ 18b. With the exception of licensed distributors, anyone possessing cigarettes contained in original packages which are not tax stamped as required by this Act, or which are improperly tax stamped, shall be liable to pay, to the Department for deposit in the State Treasury, a penalty of \$15 for each such package of cigarettes in excess of 100 packages. Such penalty may be recovered by the Department in a civil action. 35 **ILCS** 130/18b

What is clear and uncontested in this matter is that 800 packages of unstamped cigarettes were found on the premises of the tap on May 7, 2003. The Tap is a retail liquor business in Illinois, operating under Illinois Business Tax No. 0456-0815. *Jane Doe* operates *ABC's Tap* and sells Illinois stamped cigarettes in the vending machine at the business. *Doe* also admitted that she had 800 packages of unstamped cigarettes at the business on May 7, 2003.

The argument of the taxpayer is that *Doe* was not acting as a retailer when she re-sold the Native brand cigarettes, at no profit, to other persons. *Doe* does not smoke. (Tr. p. 28) Ms. *Doe* acts as a “payee” for some individuals that are Social Security recipients (Taxpayer’s Ex. No. 1) and who ordered some of the Native brand cigarettes. (Tr. p. 30) *Doe* ordered Native

brand cigarettes from a New York Indian Reservation through JR's Smoke Shop for friends and people who were on limited incomes. She kept a list of the names of the people that ordered the cigarettes. (Taxpayer's Ex. No. 2) When the cartons of cigarettes arrived, *Doe* placed the Native brand cigarettes in bags with the people's names on them that had ordered the cigarettes or wrote the name on the carton. (Dept. Ex. No. 1; Tr. pp. 27-28) If more than 20 cartons were ordered, there were no shipping costs to *Doe*. (Tr. p. 38) There was no documentation with the cigarettes that Illinois taxes were due. (Tr. p. 23) *Doe* did not know that Illinois taxes were due on the cigarettes. (Tr. pp. 26, 31) *Doe* did not consider herself a retailer when she was buying and selling the Native brand cigarettes for her friends and acquaintances. (Tr. pp. 29-30) She asserted that she put the charges on her personal credit card (Tr. pp. 18, 24) and kept the transactions separate from her business account. (Tr. p. 24) She asserted that the cigarettes cost \$10 a carton and that is what she sold them for. (Tr. pp. 23-28)

Taxpayer's Memorandum of Law admits that if the packages are in the possession of a retailer or distributor the packages must be stamped. (Taxpayer's Memo p. 2) It then goes on to state that "[I]f the cigarettes were bought out of the state by a purchaser the cigarettes are not required to be stamped if consumed by that purchaser or given to another without valuable consideration to consume. (See definition of retailer at 35 ILCS 130/1)" The definition of retailer at 35 ILCS 130/1 is:

"Retailer" means any person who engages in the making of transfers of the ownership of, or title to, cigarettes to a purchaser for use or consumption and not for resale in any form, for a valuable consideration, . . .

"Retailer" shall be construed to include any person who engages in the making of transfers of the ownership of, or engages in the making of transfers of the ownership of, or title to, cigarettes to a purchaser, for use or consumption by any other person to whom such purchaser may transfer the cigarettes without a valuable

consideration, . . .

The Cigarette Tax Act is very clear - whenever any original package of cigarettes is found in the place of business or in the possession of any person who is not a licensed distributor without the proper Illinois stamps underneath the sealed transparent wrapper, the *prima facie* presumption is that the person is in violation of the Cigarette Tax Act. While I believe that Ms. *Doe* is a caring individual who does volunteer work for the American Red Cross and tries to help others in need (Taxpayer's Ex. No. 1), there is no provision in the statute to use this as a standard for abatement of the penalties at issue and, in fact, the statutory provision regarding possession of over 100 unstamped cigarette packages has no language about any abatement of the penalty. *Doe* admitted that she had 800 packages of unstamped cigarettes at her place of business on May 7, 2003 and that she transferred these cigarettes to customers. She is not a licensed distributor. She is a retailer licensed under Illinois Business Tax number 0456-9091.

The admission into evidence of the records of the Department under the certification of the Director at a hearing before the Department or any legal proceeding establishes the Department's *prima facie* case. 35 ILCS 130/9a; Copilevitz v. Department of Revenue, 41 Ill. 2d 154 (1968); Central Furniture Mart v. Johnson, 157 Ill. App. 3d 907 (1<sup>st</sup> Dist. 1987) To overcome the presumption of correctness of the Department's *prima facie* case a taxpayer must produce evidence identified with books and records kept by the taxpayer. Oral testimony is not sufficient. A. R. Barnes v. Department of Revenue, 173 Ill. App. 3d 826 (1<sup>st</sup> Dist. 1988); Masini v. Department of Revenue, *supra*; Rentra Liquor Dealers, Inc. v. Department of Revenue, 9 Ill. App. 3d 1063 (1973)

Taxpayer has offered no documentary evidence to overcome the Department's *prima facie* case in this matter.

**WHEREFORE** for the reasons stated above, it is recommended that the 800 packages of cigarettes confiscated by the Department from *Jane Doe* d/b/a *ABC's Tap*, on May 7, 2003 be forfeited to the State of Illinois and, further, that a civil penalty of \$11,400 be assessed against *Jane Doe*.

Barbara S. Rowe  
Administrative Law Judge  
November 16, 2006